



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

PAMELA DARWIN,)
)
Plaintiff,)
)
v.)
)
MICHAEL J. ASTRUE,)
Commissioner of Social)
Security,)
)
Defendant.)
_____)

Case No. EDCV 10-0572-MLG
MEMORANDUM OPINION AND ORDER

Plaintiff Pamela Darwin seeks judicial review of the Commissioner's denial of her application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") benefits under the Social Security Act. For the reasons discussed below, the decision of the Commissioner is REVERSED and the matter REMANDED for further proceedings consistent with this opinion.

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1 **I. Factual and Procedural History**

2 Plaintiff was born on September 23, 1958 and was 51 years old at
3 the time of the administrative hearing. (Administrative Record ("AR")
4 108.) She received her GED and has specialized vocational training in
5 truck driving. (AR 131.) Plaintiff has work experience as a cashier,
6 sales clerk and telephone operator. (AR 127.)

7 Plaintiff filed an application for DIB and SSI benefits on January
8 25, 2008, alleging that she had been disabled since June 29, 2004, due
9 to heart problems, including two heart attacks, panic attacks, high
10 blood pressure, high cholesterol and affective mood disorder. (AR 108-
11 112, 113-116.) Plaintiff's application was denied initially on June 4,
12 2008 (AR 56-60), and upon reconsideration on September 24, 2008. (AR 63-
13 67.) An administrative hearing was held on October 27, 2009 before
14 Administrative Law Judge ("ALJ") Jay E. Levine. Plaintiff, represented
15 by counsel, testified, as did a Vocational Expert ("VE"). (AR 30-51.)

16 On December 11, 2009, ALJ Levine denied Plaintiff's application for
17 benefits. (AR 18-26.) The ALJ found that Plaintiff had not engaged in
18 substantial gainful activity since the alleged onset date. (AR 20.) The
19 ALJ further found that the medical evidence established that Plaintiff
20 suffered from the following severe impairments: status post two heart
21 attacks and stent placement. (Id.) However, the ALJ concluded that
22 Plaintiff's impairments did not meet, or were not medically equal to,
23 one of the impairments listed in 20 C.F.R., Part 404, Subpart P,
24 Appendix 1. (AR 17.) The ALJ concluded that Plaintiff retained the
25 following residual functional capacity ("RFC"):

26 The claimant has the residual functional capacity to perform
27 less than a full range of light work as defined in 20 CFR
28 404.1567(b) and 416.967(b). The claimant is not to work on

1 dangerous machinery; and precluded from jobs with more than
2 occasional detailed conversation with the public or fellow
3 employees, superficial greetings are not precluded, detailed
4 problem solving in conjunction with the public or other
5 employees is precluded.

6 (AR 22.)

7 The ALJ found that Plaintiff was capable of performing her past
8 relevant work as a cashier, sales attendant and telephone operator.
9 (AR 25-26.) Accordingly, the ALJ concluded that Plaintiff was not
10 disabled within the meaning of the Social Security Act. (AR 26.)

11 On March 12, 2010, the Appeals Council denied review (AR 1-3),
12 and Plaintiff timely commenced this action for judicial review. On
13 November 4, 2010, the parties filed a Joint Stipulation ("Joint Stp.")
14 of disputed facts and issues. Plaintiff contends that (1) certain
15 requirements of her past relevant work as a cashier, sales attendant
16 and telephone operator, as defined by the Dictionary of Occupational
17 Titles ("DOT"), conflict with the functional limitations found by the
18 ALJ, and (2) the ALJ erred in failing to properly consider the opinion
19 of Plaintiff's treating physician. (Joint Stp. 3.) Plaintiff requests
20 that this Court reverse and remand for an award of benefits, or in the
21 alternative, reverse and remand for a new administrative hearing.
22 (Joint Stp. 24.) The Commissioner requests that the ALJ's decision be
23 affirmed. (Id.)

24 After reviewing the parties' respective contentions and the
25 record as a whole, the Court finds Plaintiff's contention regarding
26 the ALJ's error in determining that Plaintiff was able to perform her
27 past relevant work given the mental limitations in the ALJ's RFC
28 assessment to be meritorious and remands this matter for further

proceedings consistent with this opinion.¹

II. Standard of Review

Under 42 U.S.C. § 405(g), a district court may review the Social Security Commissioner's decision to deny benefits. The Court must uphold the Social Security Administration's disability determination unless it is not supported by substantial evidence or is based on legal error. *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing *Stout v. Comm'r of Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir. 2006)). Substantial evidence means more than a scintilla, but less than a preponderance; it is evidence that "a reasonable person might accept as adequate to support a conclusion." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether substantial evidence supports a finding, the reviewing court "must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1996). "If the evidence can support either affirming or reversing the ALJ's conclusion," the reviewing court "may not substitute [its] judgment for that of the ALJ." *Robbins*, 466 F.3d at 882.

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¹ The Court will only address the ALJ's finding that Plaintiff was capable of performing her past relevant work in detail. However, as noted above, Plaintiff also contends that the ALJ erred by failing to properly consider the opinion of Plaintiff's treating physician. Because the ALJ erred in finding that Plaintiff could perform her past relevant work, the Court does not reach the remaining issue or decide whether this issue would independently warrant relief.

1 **III. Discussion**

2 Plaintiff contends that the ALJ erred in finding that she was
3 capable of performing her past relevant work as a cashier, sales
4 attendant and telephone operator because the requirements of those
5 jobs, as defined in the DOT, are inconsistent with the ALJ's RFC
6 assessment. (Joint Stp. 3.) More specifically, the ALJ determined that
7 Plaintiff was precluded from jobs that require more than occasional
8 detailed conversation with the public or fellow employees and from
9 jobs that require detailed problem solving in conjunction with the
10 public or other employees. (AR 22.) Plaintiff argues that these
11 limitations are inconsistent with the requirements of her past
12 relevant work because each of those three jobs requires more than just
13 occasional detailed conversation with the public and fellow employees
14 and also requires detailed problem solving in connection with the
15 public or other employees. (Id.)

16 The ALJ based his conclusion that Plaintiff could perform her
17 past work as a cashier, sales attendant and telephone operator on the
18 testimony of the VE. (AR 25-26.) At the administrative hearing, the
19 ALJ posed the following hypothetical to the VE:

20 Assume a hypothetical individual of the claimant's age,
21 education, prior work experience. Assume this person is
22 restricted to a light range of work, no work on dangerous
23 machinery, precludes jobs that have more than occasional
24 detailed conversation with the public or fellow employees,
25 superficial greeting, hello, goodbye, not precluded but
26 detailed problem solving in conjunction with the public or
27 other employees as precluded. Could such a hypothetical
28 individual perform any of claimant's past work?

1 (AR 49.) The VE responded that Plaintiff would be capable of
2 performing her past relevant work as a fast food cashier (DOT 311.472-
3 010), sales attendant (DOT 299.677-010), and telephone operator (DOT
4 235.662-022). (AR 49.)

5 At step four of the five-step disability determination process,
6 the claimant bears the burden of showing that she can no longer
7 perform her past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(e);
8 *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir. 2001). Although the
9 burden of proof lies with the claimant at step four, the ALJ still has
10 a duty to make the requisite factual findings to support his
11 conclusion. *Id.* This is done by looking at the "residual functional
12 capacity and the physical and mental demands" of the claimant's past
13 relevant work. 20 C.F.R. §§ 404.1520(e) and 416.920(e). The claimant
14 must be able to perform: (1) the actual functional demands and job
15 duties of a particular past relevant job or (2) the functional demands
16 and job duties of the occupation as generally required by employers
17 throughout the national economy. SSR 82-61. This requires specific
18 findings as to the claimant's RFC, the physical and mental demands of
19 the past relevant work, and the relation of the RFC to the past work.
20 SSR 82-62. *Id.* at 845.

21 As a preliminary matter, the Court notes that it is unclear from
22 the record why the ALJ, in assessing Plaintiff's RFC, determined that
23 Plaintiff was precluded from jobs that require more than occasional
24 detailed conversation with the public or fellow employees and from
25 jobs that require detailed problem solving in conjunction with the
26 public or other employees. (AR 22.) The ALJ specifically found that
27 Plaintiff's alleged mental impairments, apparently panic attacks and
28 depression, were not severe and caused no "more than minimal

1 limitation in Plaintiff's ability to perform mental work activities."
2 (AR 21.) Accordingly, because he found Plaintiff's mental impairments
3 non-severe, it is not clear why the ALJ included these mental
4 limitations regarding contact with the public and problem solving in
5 the RFC assessment.² Regardless, this Court is bound by the ALJ's
6 assessment of the claimant's RFC and its accompanying functional
7 limitations, and therefore will determine whether these noted
8 limitations preclude Plaintiff from performing her past relevant work.

9 Having reviewed the DOT requirements for the jobs of fast-foods
10 worker (DOT 311.472-010), sales attendant (DOT 299.677-010), and
11 telephone operator (DOT 235.662-022), it appears that the requirements
12 of these jobs conflict with the mental limitations imposed by the RFC
13 assessment. For example, each of these three jobs requires
14 "significant" involvement with people. See DICOT §§ 311.472-010,
15 299.677-101, 235.662-022. Also, all three of these jobs require either
16 frequent talking (from 1/3 to 2/3 of the time) or constant talking
17 (2/3 or more of the time). *Id.* In fact, the telephone operator job
18 requires the ability to "speak before an audience with poise, voice
19 control, and confidence" See DICOT § 235.662-022 (emphasis
20 added). Given these various verbal and communicational requirements,
21 it is difficult to see how Plaintiff would be able to perform any of
22 these jobs if she is limited to no more than occasional detailed
23 conversation with the public or fellow employees and from detailed
24 problem solving in conjunction with the public or other employees.

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26 "[I]n order for an ALJ to rely on a job description in the [DOT]

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28 ² Upon remand, the ALJ may wish to more clearly articulate the
evidence upon which he bases his assessment of Plaintiff's RFC.

1 that fails to comport with a claimant's noted limitations, the ALJ
2 must definitively explain this deviation. *Pinto*, 249 F.3d at 847,
3 citing *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995).
4 Further, an ALJ "may rely on expert testimony which contradicts the
5 DOT, but only insofar as the record contains persuasive evidence to
6 support the deviation." *Light v. Social Security Admin.*, 119 F.3d 789,
7 793 (9th Cir. 1997). Here, the ALJ did not "definitively explain" the
8 apparent discrepancy between Plaintiff's noted limitations and the
9 requirements of Plaintiff's past relevant work as listed in the DOT.
10 Accordingly, the matter shall be remanded for additional findings to
11 on this issue.

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13 **IV. Conclusion**

14 For the reasons discussed above, the decision of the Social
15 Security Commissioner is REVERSED and REMANDED for further proceedings
16 consistent with this opinion.

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18 DATED: November 12, 2010

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21 **MARC L. GOLDMAN**

22 MARC L. GOLDMAN
23 United States Magistrate Judge
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